IN THE

Supreme Court of the United States

OCTOBER TERM, 1907.

No. 79.

R. ALLYN LEWIS AND LAETITIA M. LEWIS, APPELLANTS,

vs.

FRED HERRERA, RECEIVER FOR THE INTERNATIONAL BANK IN NOGALES, A CORPORATION, APPELLEE.

APPEAL FROM THE SUPREME COURT OF THE TERRITORY OF ARIZONA.

BRIEF FOR APPELLEE.

STATEMENT OF THE CASE.

This is a suit by a creditor to set aside as void, two deeds executed by the debtor to his wife, and

to have the property therein described subjected to the payment of his judgment.

The case was tried upon an agreed statement of facts. The district court held the deeds to be void as against plaintiff. Defendants appealed to the Supreme Court of Arizona, which affirmed the judgment of the lower court, and from this last judgment defendants have appealed to this court.

The facts briefly are as follows: On August 25, 1903, while appellants, R. Allyn Lewis and Laetitia M. Lewis, his wife, were in Germany, Lewis signed and delivered to his wife a deed conveying to her certain property situate in Phoenix, Maricopa County, Arizona, the consideration being love and affection. The execution of the deed was not acknowledged by Lewis before any officer authorized to take acknowledgments, until January 9, 1904, when he did acknowledge the same before a Notary in the State of New York. On December 19, 1903, in the State of New York, Lewis signed and delivered to his wife a second deed, conveying to her the same property, but with a more accurate description; the consideration therefor being also love and affection. This second deed was likewise not acknowledged by Lewis before any officer authorized to take acknowledgments, until January 9, 1904.

After Lewis had signed the first deed, but before he had acknowledged it, and before he had either signed or acknowledged the second deed, to-wit: between November 5, 1903, and December 15, 1903, he became indebted in a large sum to the In-

ternational Bank in Nogales, a bank doing business in Nogales, Arizona, which indebtedness was thereafter reduced to judgment in an action before the district court in Arizona, brought by Fred Herrera, receiver for the bank. Execution was issued under this judgment; it was returned unsatisfied; the judgment is still unpaid; hence this suit to set aside said deeds.

At the time Lewis signed the first deed to his wife, he was solvent and was not indebted to the said bank in any sum whatsoever; but at the time he signed the second deed, and on January 9, 1904, when for the first time, he acknowledged before the notary the execution of both the first and second deeds, he was indebted to said bank, and he was not possessed of property within the Territory of Arizona, subject to execution, sufficient to pay his existing debts.

Appellee contends that, under the statute of Arizona, Par. 725, Revised Statutes of Arizona, 1901, a conveyance of real property is ineffective and void, unless made by an instrument in writing, signed and *acknowledged* by the grantor. That as neither of the deeds signed by Lewis were acknowledged by him until January 9, 1904, neither became effective as conveyances until that day, and as on that day Lewis had already contracted his debt to the bank, and as each deed was a deed of gift and not for a consideration deemed valuable in law, and as it did not appear that on that day he was possessed of property within the Territory of Arizona, subject to

execution, sufficient to pay his debt to the bank, each of said conveyances, under the provisions of Par. 2698, Revised Statutes of Arizona, 1901, was void as to his said prior creditor, the bank.

Par. 2698, Revised Statutes of Arizona, 1901, is as follows:

> "2698. Every gift, conveyance, assignment, "transfer or charge made by a debtor which is "not upon consideration deemed valuable in law "shall be void as to prior creditors, unless it ap- "pear that such debtor was then possessed of "property within this territory, subject to execu- "tion, sufficient to pay his existing debts; but "such gift, conveyance, assignment, transfer or "charge shall not on that account merely be de- "creed to be void as to subsequent creditors or "purchasers."

So that the one and only question in this case is, whether or not, under the provisions of Par. 725 of the Revised Statutes of Arizona, 1901, a deed, which is signed but is not acknowledged, is effective as a conveyance of real property.

Said Par. 725 is as follows:

> "725. Every deed or conveyance of real estate "must be signed by the grantor and must be duly "acknowledged before some officer authorized "to take acknowledgments, and properly certi- "fied to by him for registration."

POINTS AND AUTHORITIES.

A deed or conveyance of real property, to be valid, under the law of Arizona, must be signed *and acknowledged* by the grantor.

> Par. 725, Revised Statutes of Arizona, 1901, *supra.*

This statute has been construed by the Supreme Court of Arizona to mean that the deed or conveyance must be acknowledged by the grantor, as well as signed by him, and that until acknowledged the deed or conveyance is ineffectual to convey title.

> Lewis et ux v. Herrera, 85 Pac. Rep., 245-246.

The construction of this statute by the local court is of great, if not of controlling weight.

> Copper Queen Consolidated Mining Company v. Territorial Board of Equalization of Arizona, 206 U. S., pages 474-482.
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> Sweeney v. Lomme, 22 Wall., 208;
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> Northern P. R. Co. v. Hambly, 154 U. S., 349-361;
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> Fox v. Haarstick, 156 U. S., 674-679.

Similar statutes have been so construed by other courts.

Clark v. Graham, 6 Wheat, 577;

Summers v. White, 71 Fed. (C. C. A.) 106;

Herndon v. White, 52 Ala., 597;

Chadwick v. Carson, 78 Ala., 116;

Carlisle v. Carlisle, 78 Ala., 542;

French v. French, 62 N. H., 234;

Merwin v. Camp, 3 Conn., 35;

Heelan v. Hoagland, 10 Neb. 511;

Hout v. Hout, 20 Ohio St., 124;

Smith v. Hunt, 13 Ohio, 260;

Allston v. Thompson, Cheves (S. C.) 271.

The two deeds from Lewis to his wife were, therefore, not effective as conveyances until January 9, 1904.

On January 9, 1904, Lewis was indebted to the bank; he was not then possessed of property in Arizona sufficient to pay his debts; the deeds were without consideration deemed valuable in law; therefore, as to the bank, a prior creditor, the deeds were void.

Par. 2698, Rev. Stats. of Arizona, 1901, *supra.*

ARGUMENT.

As the second deed from Lewis to his wife was both signed and acknowledged after Lewis became indebted to the bank; as it was a gift and as it did not appear that at the date of signing he was possessed of property in Arizona, subject to execution, sufficient to pay his debts, it is beyond question, that under Par. 2698, Revised Statutes of Arizona, 1901, already quoted in full, that deed was void as to his prior creditor, the bank, and Herrera, its receiver.

The first deed, however, was signed by Lewis before he became so indebted, but, we maintain that, under the statute of Arizona, a deed signed, but not acknowledged, is ineffectual as a conveyance of real property; that this deed did not become effective as a conveyance until it was acknowledged, to-wit, on January 9, 1904, and on that day Lewis was already indebted to the bank, and the deed was void as to it, a prior creditor.

So that the only question in this case is, whether or not, under the statute of Arizona, a deed signed but not acknewledged, is valid as a conveyance of real property.

The statute, Par. 725, Revised Statutes of Arizona, 1901, is as follows:

> "725. Every deed or conveyance of real estate "must be signed by the grantor and must be "duly acknowledged before some officer author- "ized to take acknowledgments, and properly "certified to by him for registration,"

This statute is very clear; very simple. It requires that the deed or conveyance of real estate must be signed, and must be duly acknowledged. The acknowledgment is made by the statute as necessary as the signing. It is as logical to say that under this statute, a deed is valid if not signed by the grantor, as it is to say it is valid if not duly acknowledged by him.

This statute has already been construed by the Supreme Court of Arizona. In the case of Lewis v. Herrera, 85 Pacific Reporter, p. 245-246, that court says:

> "The provisions of paragraph 725, above "cited, seem to us to permit of but one construc- "tion. When it says that every deed and con- "veyance of real estate must be signed by the "grantor and must be duly acknowledged by "some officer authorized to take acknowledg- "ments, it is equivalent to saying that no deed, "unless executed as therein provided will operate "to effect a conveyance of real estate," and it held the deeds void, until acknowledged.

This Honorable court in the case of Northern Pacific R. Co. v. Hambly, *supra,* says:

> "While this construction, given by a su- "preme court of a territory, is not obligatory "upon this court, it is certainly entitled to re- "spectful consideration, and in a doubtful case "might well be accepted as turning the scale in "favor of the doctrine there announced."

In passing upon the validity of a deed under the statute of Ohio, which required a deed to be

signed and sealed by the grantor in the presence of two witnesses and to be acknowledged, this Honorable Court said:

> "Although there are no negative words in "this clause, declaring all deeds for the convey- "ance of lands executed in any other manner to "be void, yet this must be necessarily inferred "from the clause in the absence of all words in- "dicating a different legislative intent, and, in "point of fact, such is understood to be the uni- "form construction of the act in courts of Ohio." And the deed was held to be void.
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> "Calrk vs. Graham, 6 Wheat, 577."

The same subject was recently (1895) reviewed by the Circuit Court of Appeals, Eighth Circuit, in construing the following statute of Nebraska:

> "Deeds of real estate or any interest there- "in, in this State, except leases for one year or "for a less time, if executed in this State, must be "signed by the grantor or grantors, being of law- "ful age, in the presence of at least one com- "petent witness, who shall subscribe his or her "name as a witness thereto, and be acknowl- "edged or proved and recorded as directed in "this chapter."

This statute was held by the Court to be mandatory; and an assignment of real property, not subscribed by one competent witness, as therein required, was held to be void and to pass no title. Many cases are cited in the opinion in support of this position,

including the case of Clark vs. Graham, *supra*, and Ohio cases.

Summers vs. White, 71 Fed. Rep. 106.

Construing the same statute the Supreme Court of Nebraska has held that a deed of assignment of real property, not acknowledged by the grantor, is void as against the creditors of the grantor.

Heelan vs. Hoagland, 10 Neb., 511 (7 N. W. 282).

To the same effect is Hout vs. Hout, 20 Ohio St., p. 124.

The State of Alabama has a statute similar to ours, and the Supreme Court of that State has uniformly held that a deed not acknowledged is void.

The first case in Alabama is Hendon vs. White, 52 Ala. 597, decided in 1875. For the convenience of the Court, we will quote at some length from that case.

The Court said:

"The code declares conveyances for the "alienation of lands must be attested by one, "or, where the grantor cannot write, by two "witnesses. An acknowledgment of execution, "before an officer authorized to take it, dis- "penses with the necessity of attestation. (R. "C. 1535-6.) By the common law, neither at- "testing witnesses nor an acknowledgment of "execution before a public officer was necessary "to the validity of a deed. These constituted

"only evidence of authenticity, which compelled "a party relying on the deed to proof of a differ- "ent character from that he would otherwise be "required to produce. (Robertson vs. Kennedy, "1 Stew. 245; Dilligham vs. Brown, 38 Ala. "311) Prior to the code this rule of common "law obtained here. * * * * The sec- "tions under consideration can have but one of- "fice to perform in this view. They operate an "abrogation of the common law rule, and sub- "stitute in its stead the essentials of an alienation "of lands. These essentials must be observed, or "the alienation is unauthorized and ineffectual. "They can not be esteemed as providing a mere "cumulative mode of conveyance, for at common "law the mode of conveyance prescribed would "be valid and operative, and would have been "generally observed. As no conveyances are "now in use here which livery of seisin ever at- "tended, the purpose was to require, as indis- "pensible to an alienation of lands, an authenti- "cation of the act partaking of the character of "the conveyance by which it was done; as the "title could pass only by writing, that there must "be witnesses to its execution subscribing in "writing, or an acknowledgement before an of- "ficer of the law authorized to take and certify "it. A safeguard against fraud, perjury, and "clandestine conveyances is thus provided. Such "safeguard is a necessity to the security of "titles."

"In the case of French vs. French (63 N. "H. 234), in which the conveyance was very "similar to that made by Walker to his daugh- "ter, a conveyance founded only on the considera- "tion of love and affection, which was not attest- "ed by two witnesses as required by the statutes

"of that State, was declared invalid as a deed. "A like decision founded on a similar statute "was made by the Supreme Court of Connecti- "cut, in Merwin vs. Camp, 3 Conn. 35. A "statute of Ohio, passed in 1805, declared that "deeds for the conveyance of lands 'shall be "signed and sealed by the grantor, in the pres- "ence of two witnesses, who shall subscribe the "said deed of conveyance, attesting the ac- "knowledgement of the signing and sealing "thereof,' etc. A deed attested by one witness "only, founded on a valuable consideration, was "declared insufficient to pass the legal estate, "and inadmissable as evidence of a conveyance. "Courcier vs. Graham, 1 Ham. (Ohio) 330.) "The Supreme Court of the United States, in "following this decision, was met by the objec- "tion, that as other modes of conveyance than "that prescribed were not expressly prohibited, "the deed should be regarded as valid at com- "mon law. But the Court said: 'Although "there are no negative words in this clause de- "claring all deeds for the conveyance of lands "executed in any other manner to be void; yet "this must be necessarily inferred from the "clause, in the absence of all words indicating a "different legislative intent.' (Clark vs. Graham, "6 Wheat 577, 5 L. Ed. 334.) The Court of "Appeals of South Carolina gave the same con- "struction t oa similar statute of that State. "(Allston vs. Thompson, Cheves' 271.) The "general rule is, that if the statute limits a thing "to be done in a particular form or manner, it "excludes every other mode, and affirmative ex- "pressions introducing a new rule imply a nega- "tive. (Sedgwick on Stat. & Cons. 31) This "rule appears to us to be peculiarly applicable

"to the statutor provisions embodied in a code "intended to supercede, as to the matters em- "braced in it, not only existing statutes, but com- "mon law principles. The instrument intended "as a conveyance to Mrs. Spann, not being at- "tested or acknowledged, was inoperative to pass "to her the legal estate, until its acknowledge- "ment in 1868."

In the case of Chadwick vs. Carson, 78 Ala- 116, the Court said:

"The face date of the mortgage is October "3, 1872. It has no subscribing witnesses, and "remained without the certificate of acknowl- "edgement until January 1, 1873. During that "time, it was entirely inoperative as a convey- "ance. It wanted an indispensible element of "execution, and was of no greater force than a "deed signed but not delivered. (Hendon vs. "White, 52 Ala. 597; Lord vs Fulmer, 57 Ala. "615; Stubbs vs. Kohn, 64 Ala. 187). The "mortgage in this case must be held to have been "executed January 1, 1873, the date which the "certificate of acknowledgement bears."

In the case of Carlisle vs. Carlisle, 78 Ala. 542, the Court said:

"As the title to real estate can pass only "by writing, when not devolved by operation of "law, the purpose of the statutes in prescribing "due andproper solemnities to be observed in the "execution of such conveyance, is to guard the "security of titles, and impart confidence, by "preventing, as far as practicable, fraud, impo- "sition, and clandestine conveyances. The effect "of the statutes is to declare inoperative a con-

"veyance of land executed in any manner other "than substantially as provided, on the settled "general rule, that when the statute limits an act "to be done in a particular form or manner, ev- "ery other mode is excluded."

To the same effect are the following Alabama cases:

Watson vs. Herring, 115 Ala. 217 (22 So. Rep. 28).

Eureka Lumber Co. vs. Brown, 130 Ala. 140 (15 So. Rep. 518).

Caperton vs. Hall, 83 Ala. 171 (3 So. Rep. 234).

Stewart vs. Beard, 29 Ala. 470.

Dugger vs. Collins, 69 Ala. 324.

Ky. Bank vs. Jones, 59 Ala. 123.

Lord vs. Fulmer, 57 Ala. 615.

Appellants contend that paragraph 725 of the Arizona statute was adopted from the statutes of Texas, and that the Texas courts have construed their statute to mean that a deed signed but not acknowledged is effective to convey title..

The answer to this is, that the Arizona statute was not adopted from Texas—it differs essentially from the Texas statute.

The Texas statute, Art. 630, Civil Statutes of Texas, is as follows:

"Every deed or conveyance of real estate "must be signed or acknowledged by the grantor "in the presence of at least two credible subscrib- "ing witnesses thereto; or must be duly acknowl- "edged before some officer authorized to take "acknowledgments, and properly certified to by "him for registration."

The Texas statute requires every deed or conveyance to be signed, *or* acknowledged in the presence of two subscribing witnesses, *or* acknowledged before a proper officer.

The Arizona statute requires a deed to be signed *and* acknowledged before a proper officer.

Paragraph 725 of the Revised Statutes of 1901, is different from Section 220 of the Revised Statutes of Arizona of 1887.

Section 220 of the Revised Statutes of Arizona of 1887, is in the exact language of the Texas statute. It is as follows:

"220. Every deed or conveyance of real "estate must be signed or acknowledged by the "grantor in the presence of at least two credible "subscribing witnesses thereto; or must be duly "acknowledged before some officer authorized "to take acknowledgements, and properly certi- "fied to by him for registration."

But in 1901 the Legislative Assembly of Arizona saw fit to change this statute so as to make both signing *and* acknowlegdment by the grantor essential requirements to the validity of every deed and conveyance.

If the Arizona Statute of 1887, which is the same as the Texas statute, was so ambiguous as to require reconstruction, that ambiguity is eliminated by the statute of 1901. The statute of 1901 is too clear and simple to require construction; it requires that every deed or conveyance must be signed and must be acknowledged. This change in the language of the statute is significant. It was done for a purpose, and that purpose was to make the acknowledgment by the grantor before a proper officer a prerequisite to the validity of the deed, as much as the signing.

At common law a seal was necessary to the validity of a deed. Arizona has, by statute, abolished private seals. Paragraph 4054, Revised Statutes of Arizona, 1901, is as follows:

> "No private seal or scroll shall be neces-
> "sary to the validity of any contract, bond or
> "conveyance whether respecting real or person-
> "al property, or any other instrument of writing
> "whether official, judicial or private, except
> "such as are made by corporations, nor shall the
> "addition or ommission of a seal or scroll in any
> "way effect the force and effect of any of the in-
> "struments mentioned herein, which have been
> "heretofore or which may hereafter be made."

A deed or conveyance of real property in Arizona is not required to be under seal; but, under paragraph 725, of the statute, it must be signed and acknowledged by the grantor. The acknowledgment is an effective substitute for the seal, and a potent preventative of fraud.

The statute in force in Arizona since 1901 is so different from the statute of Texas, that a consideration of the Texas cases is unnecessary.

Appellants may contend that, if the instruments were ineffectual as conveyances, they were enforceable as contracts to convey under paragraph 732, Revised Statutes of Arizona, 1901, which is as follows:

> "When an instrument in writing, which "was intended as a conveyance of real estate, or "some interest therein, shall fail, either in whole "or in part, to take effect as a conveyance by "virtue of the provisions of this title, the same "shall, nevertheless, be valid and effectual as "a contract upon which a conveyance may be en- "forced, so far as the rules of law will permit."

The unacknowledged deed of Lewis to his wife, under the provisions of this section, it might be claimed, was good as a contract upon which a conveyance could be enforced by the wife, so far as the rules of law will permit.

But the deed, being executed without consideration, is not such a contract as can be enforced, because it is well settled that equity will not decree the specific performance of a contract, unless supported by a valuable consideration.

Am. & Eng. Ency. of Law (2d Ed.), vol. 28; p. 25.

Ency. of Plead. & Prac., vol. 18, pp. 786-824.

Again, the right of the wife to enforce the contract is not a question in this case. Before the present suit was brought, Lewis made the proper acknowledgment to each deed. He did all that a court of equity could have forced him to do. And it is these very deeds which subsequently he did properly acknowledge, that we say are void as to the bank and its receiver, because, when duly executed by being acknowledged, Lewis was already indebted to the bank; the bank was then a "prior creditor," and as to a prior creditor, the deeds being gifts and without consideration, were void, it not being made to appear that Lewis was then possessed of property in Arizona sufficient to pay his existing debts.

We respectfully submit the judgment of the lower court should be affirmed.

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